Decision 04-04-019 April 1, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Edison Company (U 338-E) for Approval of a Power Purchase Agreement under PUHCA Section 32(k) Between the Utility and a Wholly-Owned Subsidiary and for Authority to Recover the Costs of Such Power Purchase Agreement in Rates.	Application 03-07-032 (Filed July 21, 2003)

ORDER MODIFYING DECISION 03-12-059 AND DENYING REHEARING OF DECISION, AS MODIFIED

INTRODUCTION

In this order, we deny applications for rehearing of Decision 03-12-059 ("the Decision") filed by the Independent Energy Producers Association ("IEP"); the Office of Ratepayer Advocates and IEP, jointly ("ORA/IEP"); Alliance for Retail Energy Markets and the California Manufacturer's and Technology Association ("AReM/CMTA"); and the Navajo Nation.

Applicants contend, inter alia, that the Decision is not supported by adequate evidence and findings; that it is unlawful to approve the Mountainview PPA without requiring a competitive solicitation; that by approving the PPA we improperly relinquished ratemaking jurisdiction over Mountainview's rates to FERC; that IEP and the Navajo Nation were improperly denied access to confidential data; that it is unlawful for us to waive our Affiliate Transaction Rules and the current two-year moratorium on procurement from affiliates (imposed in D.02-10-062, in the Procurement Docket); and that we lack the authority to impose cost responsibility for potential stranded costs on departing customers.

Most of these arguments were considered before we issued the Decision. The applications have prompted us to add findings on certain issues, but they have failed to persuade us that the Decision is legally or factually erroneous. Accordingly, we will deny the requests for rehearing.

I. Evidence and Findings on Material Issues

All of the applicants contend that the Decisions lacks adequate, separately stated findings of fact and conclusions of law on issues material to the Decision, which are required by Public Utilities Code § 1705.[1] Applicants also contend that on some issues, the required findings cannot be made because the record lacks the necessary evidence, or that the findings are not supported by the evidence in the record, as required by § 1757. ORA, IEP, and the Navajo Nation all contend that the Decision lacks adequate findings on Mountainview's cost-effectiveness and on the affiliate issues. ORA/IEP contend the decision lacks findings to support the decision to allow Edison to build Mountainview through a FERC-regulated subsidiary (ORA/IEP, pp. 2-8 (citing *California Manufacturers Ass'n. v. Public Utilities Com.*, 24 Cal. 3d 251, 257 (1979) and *Los Angeles v. Public Utilities Com.*, 7 Cal. 3d 331 (1972)).) The Navajo Nation contends the record does not support our decision to grant Mountainview a CPCN. AReM/CMTA contend the Decision lacks findings supporting the decision to impose cost responsibility for any stranded costs resulting from the Mountainview PPA on departing Direct Access customers.

Section 1705 of the Public Utilities Code requires separate findings on all issues material to Commission decisions. One purpose of this requirement is to enable parties, the public, and the reviewing court to understand the basis for the decision. Another is to "help the Commission avoid careless or arbitrary action":

> "[The findings required by § 1705] are essential to 'afford a rational basis for judicial review and assist the reviewing

[1] All statutory references are to the Public Utilities Code unless stated otherwise.

> court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist the parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the commission avoid careless or arbitrary action.'" (*Los Angeles v. Public Utilities Com., supra,* 7 Cal. 3d at 337 [citations omitted].)

There is no precise definition of how specific the findings must be, but an "ultimate finding" — for example, that a project is in the public interest — is too general to satisfy the separate findings requirement of § 1705. (*Greyhound Lines, Inc. v. Public Utilities Com.* (1967) 65 Cal.2d 811; *California Motor Transport Co. v. Public Utilities Com.*, 59 Cal. 2d 270, 274 (1963). "The ultimate finding of public convenience and necessity is so general that without more, a reviewing court can only guess at how it was reached." (*California Motor Transport Co., supra,* 59 Cal. 2d at 274 [citations omitted].) Separate findings on the basic facts underlying an "ultimate finding" are required. (*Id.*) In this case, we will assume that the finding that it is in the public interest to approve Edison's PPA-subsidiary proposal is probably an "ultimate finding" — one that is supported by more specific findings on underlying facts, and by the evidence in the record. We are not required to make findings on all the arguments raised by the parties, or on all the issues that the *parties* view as material – only on those that in our judgment are material to the Decision.

A. Mountainview's cost-effectiveness

Whether Mountainview's power will be cost-effective is material to the Decision. We found that Mountainview will be cost-effective based on these underlying findings:

10. Edison has established a need for Mountainview to meet its immediate need for dispatchable peaking and intermediate capacity and its long-term need for baseload resources.

11. Edison has established that Mountainview is a cost-effective resource to meet its short-term and long-term resource needs because of its attractive purchase price, state-of the-art low heat rate of 7,100 Btu/kwh, environmental benefits, and location in its load center, irrespective of what year the entire output is needed.
12. Ratepayers will be better off with Mountainview than without it. (D.03-12-059, p. 59.)

ORA/IEP assert that these findings are too conclusory, too general, and unsupported by the evidence. Cost-effectiveness, they assert, "is a complex and difficult analysis" that includes at least ten "clusters of material issues," including a forecast of customer demand, "a cost and benefit comparison with the resources avoided by Mountainview," and whether other resources could better fill reliability needs. This type of analysis was not done, as no competitive solicitation was held. As a result, "the evidence necessary to sustain cost-effectiveness findings does not exist [in the record] in quantifiable separate form." (ORA/IEP. pp. 3-5.) Navajo Nation also argues that the record does not support the finding that Mountainview is cost-effective. (Navajo Nation, pp. 2-3, 10-11 (arguing that Mohave is more cost-effective).)

Finding of Fact No. 11 states that Mountainview is cost-effective "because of its attractive purchase price, state-of the-art low heat rate of 7,100 Btu/kWh, environmental benefits, and location in its load center." These underlying findings are specific and are based on record evidence. ORA/IEP do not assert that there are other facilities that offer the combination of advantages cited in Finding No. 11.

We also found that the "MVLP PPA purchase price is unique and reflects capital costs below that of the market." (Finding of Fact No. 13.) That finding should state instead that the option purchase price is below the original purchase price. We will make that change. The Decision's specific findings, as modified, support the conclusion that Mountainview is cost-effective.

Navajo Nation argues that record evidence indisputably establishes that Mohave is more cost-effective than Mountainview, but it fails to state what that evidence

is. In any event, the record established that Edison will need Mountainview even if Mohave continues to operate. Thus, it was unnecessary to determine which of the two facilities is more cost-effective. (For this reason, among others, we also reject the argument that we were required to hold a hearing to compare the cost-effectiveness of Mountainview and Mohave). Navajo Nation disagrees with our conclusion that Mountainview is a cost-effective resource, but it has failed to demonstrate that we reached this conclusion in error.

B. Evidence and Findings to Support Grant of CPCN

In the Decision, we gave Edison the option of acquiring Mountainview directly as a utility-owned generation facility, and ruled that if Edison chose this option, no further CPCN review would be required. (Decision, p. 64, Ordering Paragraph No. 4.) A CEQA review was conducted by the CEC, as lead agency, when it issued a license for the project to MVL, and no further CEQA review is required. (Decision, Finding No. 3.) The Navajo Nation contends that the evidence and findings do not support the Decision's conclusion that all the requirements for granting a CPCN have been met. Specifically, it contends that the record does not support the finding that Mountainview is cost-effective or in the public interest. According to Navajo Nation, approval of Edison's application (including approval of the utility-owned generation option) violates state law because it circumvents the CPCN process, which would involve a needs assessment and comparison of Mountainview with all reasonable alternatives, including Mohave, as well as CEQA review. The Navajo Nation contends that we erred by (1) failing to hold a comparative hearing in which Mountainview was compared with other feasible sources of power, such as Mohave, as required by § 1003(d) and the *Ashbacker* doctrine[2] and to consider all relevant factors, as § 1003 requires; (2) there is no demonstrated need for Mountainview that Mohave cannot satisfy, and therefore the record does not support the finding that Mountainview is needed; (3) the Decision is unsupported by record evidence comparing

[2] *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945).

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all-in cost of energy from Mountainview with the all-in cost of energy from feasible alternatives; and (4) the Decision fails to reflect evidence that Mohave is more cost-effective than Mountainview. These contentions lack merit.

1. Applicability of § 1003

Section 1001 requires any "electric corporation" to obtain a CPCN before beginning construction of a power plant. Edison argued that a CPCN is not required because: (1) construction is not beginning, but resuming, and (2) because MVL is not an "electrical corporation." We agreed with Edison in the Decision. We noted that MVL acquired a license for Mountainview from the CEC in 2001, and that CEQA review was done as part of the licensing process, with the CEC as the lead agency. (Decision, p. 57.)

As stated in the Decision, one reason §1001 does not apply is that construction is not beginning but resuming, pursuant to a license granted to MVL by the CEC. Because Mountainview was licensed by the CEC, the requirements of §1003 (including "a cost analysis comparing the project with any feasible alternative sources of power"), do not apply.[3]

However, it is inaccurate to state that MVL is not an "electrical corporation" as defined by the Public Utilities Code. MVL is not a "public utility" as defined by the Public Utilities Code because it is an exempt wholesale generator (see § 216(g), excluding EWGs from the definition of "public utility)," but if it owns a power plant in California and sells the power to a public utility, it will be an "electrical corporation" as defined in the Public Utilities Code:

> "Electrical corporation" includes every corporation or person owning, controlling, operating, or managing any electric plant

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[3] § 1003 excludes from the CPCN requirements power plants "subject to the provisions of Chapter 6 (commencing with Section 25500) of Division 15 of the Public Resources Code."

> for compensation within this state, except where electricity is generated on or distributed by the producer through private property solely for its own use or the use of its tenants and not for sale or transmission to others. (§ 218(a).)

Thus, the Decision should state that MVL is not a public utility, instead of stating that it is not an electrical corporation. We will correct this error *sua sponte*.

2. Applicability of *Ashbacker* doctrine

Navajo Nation contends a comparative hearing is required by the *Ashbacker* doctrine (*Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945)). This argument is also without merit.

The *Ashbacker* doctrine requires consolidated consideration when two applications are mutually exclusive. *Ashbacker* involved two broadcasting companies seeking to broadcast over the same frequency. Only one application could be granted. The Supreme Court held that the FCC must consider the two mutually exclusive applications jointly. (*Ashbacker Radio Corp. v. FCC, supra*, 326 U.S. 327.)[4] "Mutually exclusive" applications "are those which compete for a single available authorization; the grant to one applicant absolutely precludes all other applicants from operating in the location at issue. Accordingly, *Ashbacker* exclusivity has been construed as 'economic' [rather than legal] exclusivity." (*Western Radio Servs. v. Glickman*, 113 F.3d 966, 974 (9th Cir. 1997). Even where two applicants cannot both construct a facility on the same site, their applications are not mutually exclusive in the *Ashbacker* sense if other siting options are available. (*Id.* (applications not "mutually exclusive" where both companies preferred the same site but one of them could build facility on alternate site).) Moreover, the fact that one company may gain an economic advantage if its application is granted is not enough to make two applications "mutually exclusive." (*See ANR Pipeline Co. v. FERC*, 205 F.3d 403, 406 (D.C. Cir. 2000).)

[4] Most applications of the *Ashbacker* doctrine involve decisions by the FCC or by the Civil Aeronautics Board; only a few involve decisions by FERC. (See *Western Radio Servs. v. Glickman*, 113 F.3d 966, 974 (9th Cir. 1997) (collecting cases).

The Decision states that in approving the Mountainview PPA, we did not prejudge the Mohave application, which is pending. (Decision, Conclusion of Law No. 15.) The two applications are not mutually exclusive.[5] (We will add a finding to that effect.) Accordingly, the *Ashbacker* doctrine is inapplicable.

3. Need for Mountainview

Navajo Nation also contends that the record does not support the finding that Mountainview is needed. More specifically, it argues that the record does not demonstrate "a need for Mountainview that existing utility-owned facilities cannot satisfy." Edison's witness Mr. Hemphill testified that Edison will need Mountainview after 2006 even if Mohave continues to operate *and* Edison continues to buy power from various QF providers. (Tr. At 732: 8-23 (SCE/Hemphill).) The Coalition of Utility Employees (CUE) also submitted testimony showing that Mountainview will be needed. Accordingly, the record does not support Navajo Nation's contention.

4. Decision to allow Edison to own Mountainview through a FERC-regulated subsidiary

ORA/IEP argue that the Commission's finding in support of its decision to allow the subsidiary-PPA deal is too conclusory and internally contradictory. The challenged finding states:

> 8. We believe that it would be more advantageous to the ratepayers and customers of Edison to own Mountainview as a utility-owned facility under the historic, rate-based approach, but in today's financial and regulatory climate gave Edison the choice whether to proceed on Mountainview with the FERC jurisdictional PPA, or as a utility-owned facility. (Decision, Finding of Fact 8, p. 59.)

As Edison correctly points out, Finding of Fact No. 8 must be read in conjunction with Finding No. 7, which states that the PPA will be subject to FERC jurisdiction "and this is justified by the uncertainty of the regulatory climate and Edison's current financial

[5] See TR. at 576:3-9, 16-20; 622:9-26 (SCE/Hemphill).

condition." Regulatory changes such as adoption of a "core/noncore" structure for the electric utilities are currently under consideration, and this creates uncertainty about Edison's customer base in the years ahead. (See March 15, 2004 staff report to Senate Committee on Energy and Public Utilities on core/noncore proposal for electric utilities, prepared by the Commission's Division of Strategic Planning, and cover letter by President Peevey.) Despite this uncertainty, the record established that Edison needs Mountainview to meet its immediate need for dispatchable peaking and intermediate capacity and long-term need for baseload resources, that the PPA, as modified by the Decision, will benefit consumers, and that Edison's ratepayers "will be better off with Mountainview than without it." Mountainview is efficient and well situated, and the PPA provides that the output from the plant will be sold to Edison at cost-based rates for the 30-year life of the PPA.

Further, the PPA makes Edison responsible for gas procurement, hedging, and plant dispatch (No. 6). These provisions help protect Edison's ratepayers. Incentive provisions in the PPA are designed to give Edison financial incentives to keep the plant in good condition and to make sure that it is available when needed. (Decision, p. 24.) These provisions also help protect Edison's ratepayers. We will add findings to that effect. Taken together, these findings support the decision to allow the PPA arrangement.

5. Findings on Affiliate Issues

There are three affiliate issues addressed in the Decision: (1) whether the PPA-subsidiary deal is barred by prior Commission decisions approving the QF and KRCC settlement agreements; (2) whether the two-year moratorium on procuring power from affiliates imposed in the Procurement Docket should be waived in order to allow the PPA; and (3) whether the Commission's Affiliate Transaction Rules (ATRs) are applicable and if so, whether the Commission should waive them.

We held that (1) the prior QF settlements were inapplicable; (2) the affiliate moratorium should be waived; and (3) the ATRs are applicable, but should be waived for the Mountainview PPA. Applicants challenge all of these conclusions on several grounds, including the sufficiency of the underlying findings. The challenges to the

sufficiency of the findings are addressed along with the other challenges on affiliate issues.

II. Lack of competitive bidding

ORA/IEP contend that by approving the Mountainview PPA without requiring competitive bidding, the Decision violated § 454.5 (AB 57). They contend that the only options available to us are to direct Edison to build and operate Mountainview as a utility-owned generation or to conduct an open, competitive procurement, which ORA/IEP contend is required by pursuant to § 454.5(b).

Section 454.5, enacted in 2002, governs the electric utilities' procurement plans, including the renewables component of the utilities' portfolio. As ORA/IEP point out, the statute provides that the procurement plans shall include, among other things, "[a] competitive procurement process under which the electrical corporation may request bids for procurement-related services, including the format and criteria of that procurement process" and that the Commission "shall specify the format of that process, and criteria to ensure that the auction process is open and adequately subscribed." (§ 454.5(b)(5), (c)(1).) ORA/IEP argue that if we allow Edison to purchase power from Mountainview, § 454.5 requires competitive bidding (ORA/IEP, pp. 8-9.)

ORA/IEP read into the statute an absolute requirement for competitive bidding, allowing for no exceptions, that the statute does not contain. Subsection (b) requires electric utilities to include in their procurement plan a competitive process. Subsection (c) requires the Commission to require that a procurement plan contain "one or more of the following features:"

> (1) a competitive procurement process;
>
> (2) an incentive mechanism; and/or
>
> (3) "upfront achievable standards and criteria by which the acceptability and eligibility for rate recovery of a proposed procurement transaction will be known by the electrical corporation prior to the execution of the bilateral contract for the transaction. The commission shall provide for expedited review and either approve or reject the individual contracts

> submitted by the electrical corporation to ensure compliance with its procurement plan. . . .." (§ 454.5(c)(3).)

The statute thus allows a procurement plan to include more than one of the features listed above. This mix-and-match approach suggests that an electric utility with a procurement plan based on competitive solicitation is not necessarily precluded from obtaining Commission approval of a PPA negotiated outside of the competitive process. Accordingly, we are not persuaded by ORA/IEP's argument that by not requiring competitive bidding for the Mountainview PPA we violated the requirements of § 454.5.

At the same time, we agree that the statute clearly anticipates great reliance on a competitive procurement process. This process would be meaningless if we allowed a utility to circumvent or ignore its approved bidding process arbitrarily. Here, our decision not to require competitive bidding was based on specific and unusual circumstances. As CUE pointed out in its brief, summarizing the testimony of its witness David Marcus:

> It is highly unlikely that any other project could even equal, much less exceed, the benefits from Mountainview. The list of potential plants that could offer 1,000 MW of dispatchable capacity within Edison's service territory is not long: they are the existing power plants and the combined cycle plants either licensed or pending at the CEC. There is no reason to think any of them will have significantly lower costs than Mountainview, and it is certain that none of them would bid their output below cost.
>
> No existing plant from the pre-deregulation era could offer to provide generation for the next 30 years. They are much too old. Even if one could survive another 30 years, with heat rates of 10,300 Btu/kwh there would be a fuel cost penalty to ratepayers of about 3,300 Btu/kwh. The additional cost of the higher heat rate would be more than the entire combined annual capital and O&M costs of Mountainview. Thus, the old pre-deregulation plants could not come close to equaling the ratepayer savings from Mountainview.
>
> New combined cycle plants could presumably match Mountainview's heat rate and O&M costs if they offered to sell output at cost without *any* markup for profit, as Edison is

> offering the Mountainview output. But they would have a hard time matching Mountainview's capital costs because SCE will be obtaining Mountainview for several hundred million dollars below cost due to AES's distress sale of the project. Only the Inland Empire project could potentially match Mountainview's reduction in transmission losses, but its much larger duct burners would result in higher heat rate with associated increased fuel costs.
>
> Thus, the Commission is safe in concluding that Mountainview offers the best deal for ratepayers. There are simply no available competitors at this price. Even if there were any doubt about whether Mountainview offered the best possible deal, it would not be worth sacrificing what it certainly a very good deal for a remote chance at a slightly better one.

(Brief of CUE, pp. 8-10 [footnotes omitted], citing to testimony of CUE witness David Marcus (Ex. 26/27C).)

For the reasons laid out by CUE, it is very unlikely that a competitive solicitation process would have yielded a better deal for ratepayers than the 30-year, cost based rates contained in the Mountainview PPA. Under the unusual circumstances presented by this application, it was reasonable not to require a competitive solicitation.

III. Denial of access to cost data

ORA/IEP contend that parties that are market participants were denied due process because they were not allowed access to confidential, market-sensitive data, which precluded them from meaningful participation on the issue of Mountainview's cost-effectiveness. (ORA/IEP, pp. 10-12.) Navajo Nation contends we improperly denied it access to this same data unless it waived its tribal sovereign immunity. (Navajo Nation, p. 12.)

In this proceeding, we adopted the protective order that is in effect in the Procurement Docket. (Decision, p. 8.) In that protective order, we attempted to balance the strong policy in favor of making the record public against the need to prevent market-sensitive information from falling into the hands of market participants who could use it inappropriately. The protective order does require that market-sensitive data filed under

seal be made available to the utilities' Procurement Review Groups (PRGs), which include representatives of ORA.

Pursuant to this protective order, IEP, a "Market Participating Party," was denied access to Edison's confidential data about its future resource needs and to Sequoia's confidential cost data. Lack of access to this data prevented IEP and other market participants from evaluating Mountainview's cost-effectiveness. However, other parties, including parties actively opposed to Edison's proposal, were given access to the confidential data. We ordered Edison to submit the confidential data to its Procurement Review Group, which includes ORA.[6] The issue of cost-effectiveness was actively debated by ORA, TURN, CUE, and California Large Energy Consumers Association (CLECA). Thus, the protective order did not prevent non-market participant parties from participating effectively on the cost-effectiveness issue.

Keeping market-sensitive data out of the wrong hands is a legitimate concern. Had we not imposed the same restrictions in both proceedings, market participants could have gained access to information intentionally kept confidential in the procurement proceeding. Because misuse of market-sensitive information is a legitimate concern, we believe our decision to withhold that data from IEP is justified.

Navajo Nation contends it was deprived of the right to participate fully, and therefore denied due process, because Edison conditioned access to the confidential data on a confidentiality agreement in which Navajo Nation would have waived its tribal sovereign immunity. (Navajo Nation, p. 12.) Edison responds that without such a waiver, a confidentiality agreement would not be enforceable. (Reply, p. 14.) Navajo Nation does not state whether it asked the Commission to resolve this dispute. It is therefore unclear whether Navajo Nation claims the Commission committed an error.

[6] Because ORA was allowed access to the data via the PRG, it arguably lacks standing to challenge the protective order. It is puzzling that ORA nevertheless challenges the protective order on behalf of IEP.

Rehearing applicants are required to state their claims of error with specificity. (§ 1732.) This particular argument does not satisfy that requirement.

Navajo Nation further contends that it was denied an opportunity to participate fully because the administrative law judge declined to admit into evidence Exhibit 34, which it describes as an "all-in cost comparison" between Mohave and "a new natural gas combined cycle such as Mountainview." (Navajo Nation, pp. 12-13.) Navajo Nation argues that exclusion of this exhibit constitutes refusal to consider relevant evidence. (*Id.*)

Exhibit 34 consists of 27 pages of prepared testimony focused mostly on Mohave. The administrative law judge did not admit it into evidence because Navajo Nation sought to introduce it during hearings, well after the deadlines had passed for submitting direct and reply testimony. (10/23/03 Tr., p. 1139: 2-8.) Navajo Nation could have presented this testimony as direct testimony, which would have given the other parties an opportunity to respond to it, but it did not avail itself of the opportunity. It was not denied a meaningful opportunity to participate.

IV. Affiliate issues

The Decision held that (1) the Mountainview PPA-subsidiary deal is not barred by prior Commission decisions approving settlement agreements involving allegedly overpriced QF contracts with Edison affiliates; (2) the two-year moratorium on procuring power from affiliates imposed in the Procurement Docket should be waived in order to allow the PPA; and (3) the Commission's Affiliate Transaction Rules (ATRs) are applicable to this PPA, but should be waived. ORA/IEP and the Navajo Nation challenge these determinations on several grounds, including the sufficiency of the underlying findings.

A. QF settlement agreements

In the Decision, we concluded that the affiliate prohibitions set forth in the "KRCC Settlement" (approved in D.90-09-088) and "the QF[7] Settlement" (approved in D. 93-03-021) are not applicable to the Mountainview PPA. (Finding of Fact No. 20.) ORA/IEP contend that this finding is conclusory and therefore inadequate under § 1705. (ORA/IEP, p. 5.)

As explained in the body of the Decision, the settlement approved in 1993 was designed to prevent "sweetheart deals" between Edison International (EIX) and its unregulated QF affiliates, including KRCC — deals that tend to be costly to ratepayers. We noted that the MVL deal differs from those QF contracts. MVL is a wholly-owned subsidiary of Edison the regulated utility, it is not a QF, and its output will be subject to cost-of-service regulation. These differences mean "there is not the same opportunity for abuse." (Decision, p. 29.) We find these distinctions significant. (See Conclusion of Law No. 11: "The provisions of D. 93-03-021 do not apply to transactions between Edison and wholly-owned subsidiaries of the regulated utility.") These findings and conclusions are adequately explained and supported in the body of the decision.

B. Waiver of affiliate moratorium

ORA/IEP also challenge the finding that "it is in the public interest to grant a one-time waiver of the two-year moratorium on affiliate transactions established in D.02-10-062 so this project can go forward" (Finding of Fact No. 21). They contend this finding is too conclusory. In our Decision, we explained that it is in the public interest "because the project is a cost-effective option for ratepayers to fill a resource need, and the project could not go forward under the dictates of the moratorium." (Decision, p. 29.) It further explains that "[e]ven though the MVL/subsidiary structure is far removed from straight utility ownership, approving Mountainview is going in the general direction in which the Commission is moving in the procurement proceeding, which is towards a

[7] "Qualified Facility"

greater degree of utility re-integration." (Id.) In other words, we found that even though the PPA is a less desirable structure than straight utility ownership, it will benefit ratepayers and it also constitutes a step towards utility re-integration. For these reasons, among others, we concluded that it is in the public interest to remove the obstacle of the affiliate moratorium for this PPA. The finding is adequately explained in the Decision.

C. Waiver of Affiliate Transactions Rules

ORA/IEP further contend that we erred by waiving the ATRs. They disagree with our finding that it is in the public interest to do so in this case, and with the underlying finding that the PPA will benefit ratepayers. (See ORA/IEP, pp. 6-7.) These conclusions are supported by the record, however. As explained in the Decision, ratepayers are better off with the Mountainview PPA than without it because of its low purchase price, its location in the heart of Edison's load center, low target heat rate, environmental benefits, and assurance of cost-based rates for 30 years. Furthermore, there is no merit to IEP's contention that we lack authority to waive or change our own rules. (See § 1708.)

V. Findings required by PUHCA § 32(k) [protection against abusive affiliate transactions]

Navajo Nation and IEP contend that the record does not support the Decision's findings that the requirements of PUHCA § 32(k) have been satisfied. (Navajo Nation, pp. 13-21; IEP, 7-13.) FERC has already approved the PPA based in part on this Commission's findings, and it could be argued that these challenges are now moot. IEP's argument that FERC is unlikely to adopt the findings is clearly moot. But because this Commission is responsible for the findings required by PUHCA, we have considered the other challenges. We have already addressed many of them in the Decision or elsewhere in this order. None of the arguments presented in the applications for rehearing have persuaded us that the PUHCA findings are erroneous.

VI. Responsibility of departing customers for stranded costs

In the Decision, we adopted TURN's proposal to require departing customers to share cost responsibility "for stranded costs for the first 10 years of Mountainview's life." This provision applies to Edison customers who are currently ineligible for direct access, but who may become eligible later (if, for example, California adopts a core/noncore structure). (Decision, Finding of Fact No. 22.) AReM/CMTA object to this aspect of the Decision on several grounds.

A. Commission's authority to impose cost responsibility on departing customers

AReM/CMTA contend that we lack authority to impose cost responsibility on current bundled customers who may later want to leave the utility and choose "Direct Access." The challenged provision was adopted to prevent unfair cost-shifting to bundled customers, consistent with current state policy. In AB 117 (codified in §§ 366.2(e) and (f)), the Legislature made retail customers departing to purchase power from community aggregators responsible for their fair share of DWR and utility contract costs "stranded" by their departure. (See also § 366.2 (d)(1), stating that it is the intent of the Legislature to require every end-use customer that bought power from a utility after February 1, 2001, to pay a "fair share" of DWR procurement costs incurred during the energy crisis and "to prevent any shifting of recoverable costs between customers."[8]) The same principle applies here. There is no merit to the argument that the Commission lacks authority to impose this condition.

B. Costs are just and reasonable

Because the stranded-cost provision serves to prevent unfair cost-shifting to Edison's bundled customers, and is consistent with state policy as declared by the

[8] The Commission has issued a series of decisions on cost responsibility of DA customers. See the Commission's Answer in *Strategic Energy et al. v. CPUC*, No. S112802 (petition for writ of review denied April 30, 2003.)

Legislature, there is no merit to AReM/CMTA's argument that the costs it imposes on future Direct Access customers are unjust and unreasonable, in violation of § 451.

C. Inconsistency of findings; adequacy of findings

AReM/CMTA contend that "the Commission's implied finding that [Mountainview]'s costs may be "stranded" is inconsistent with the . . . findings that [Mountainview] is needed and cost-effective." (AReM/CMTA, p. 11) This contention is without merit. Anticipating the possibility of stranded costs, based on developments and circumstances that cannot be foreseen now is not inconsistent with making findings on need and cost-effectiveness based on known facts.

AReM/CMTA also complain that the Decision contains no finding that "departing customers will benefit from [Mountainview] after they move to direct access," and that the record would not support such a finding (pp. 9-11). But this is not the basis for the Decision's provision on responsibility for stranded costs, and the issue is not material to the decision. The basis for the provision is the policy of preventing unfair cost-shifting to bundled customers, as discussed above. (The proposed order adds a finding to that effect). Accordingly, this argument is also without merit.

D. Prejudging of issues in procurement proceeding

AReM/CMTA contend that approval of the Mountainview PPA in effect prejudges certain issues related to reserve requirements that are being addressed in the Procurement Docket. Specifically, AReM/CMTA argue that the decision prejudges certain decisions about reserves by imposing cost responsibility on departing customers for excess capacity that may result from approving the Mountainview PPA. (p. 14.) Though ideally all issues related to procurement should be addressed in an integrated fashion, we considered it important to expedite consideration of the Mountainview application. In any event, this criticism does not constitute a claim of legal error.

E. Lack of hearing/opportunity to comment

AReM/CMTA contend they were not given an opportunity to present testimony on TURN's proposal to impose cost responsibility for stranded costs on

departing customers, and that therefore the decision to adopt TURN's proposal is "unlawful." The record does not support this contention. TURN made its proposal in its direct testimony, and parties had an opportunity to address the proposal in reply testimony (even if they had not filed direct testimony). AReM/CMTA had notice that the proposal was under consideration and an opportunity to submit testimony on it, but failed to do so. Their procedural objection is meritless.

CONCLUSION

Some of the findings should be supplemented, but none of the applications for rehearing demonstrate that rehearing is warranted.

Therefore **IT IS ORDERED** that:

1. Decision 03-12-059 shall be amended as follows:
2. On page 57, in the first sentence of the first full paragraph, the phrase "electrical corporation" shall be replaced by "public utility."
3. On page 60, Finding of Fact No.13 shall be amended to state: "The MVL PPA purchase price is unique and is below the original purchase price."
4. On page 59, the following sentences shall be added to Finding of Fact 6:

> "These provisions help protect the interests of Edison's ratepayers. Incentive provisions in the PPA create financial incentives for Edison to keep the plant in good condition and to make sure that it is available when needed. These provisions also help protect ratepayer interests."

5. On page 62, the following Finding of Fact shall be added:

> 40. The Mohave and the Mountainview applications are not mutually exclusive.

6. AReM/CMTA's request for oral argument is denied.

7. Rehearing of Decision 03-12-059, as modified by this order, is denied.

This order is effective today.

Dated April 1, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I dissent.

/s/ LORETTA M. LYNCH
Commissioner